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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 440

ESTATE OF KAROLINE E. GUND, DECEASED, W. R. SPRINGATE, EXECUTOR, AND IRENE DORNER, EXECUTRIX, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 31–32) is unreported. The opinion of the Circuit Court of Appeals (R. 42–47) is reported in 113 F. (2d) 61.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 27, 1940 (R. 41). The petition for a writ of certiorari was filed September 16, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Oak Grove Cemetery Association (of La Crosse, Wisconsin) is a corporation organized and operated exclusively for charitable purposes within the meaning of Section 303 (a) (3) of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set out in the Appendix, *infra*, pp. 7–10.

STATEMENT

The facts, as stipulated (R. 14–30) and found by the Board of Tax Appeals (R. 31), may be summarized as follows:

Karoline E. Gund, the decedent, died testate on August 21, 1934. She bequeathed the residue of her estate in trust to pay the income to Irene Dorner for life. Thereafter, the corpus was to be paid to Oak Grove Cemetery Association (called in the will "La Crosse Cemetery Company") to be held as a fund for the maintenance and care of the cemetery. (R. 15, 31.)

The Oak Grove Cemetery Association is a Wisconsin corporation, incorporated in perpetuity on December 2, 1872, under Chapter 67 of the Wisconsin statutes of 1858. It has no stockholders. It is managed by trustees and officers. The trustees elect the officers and the trustees are elected by the owners of burial rights. The corporation owns a cemetery in La Crosse, Wisconsin, which is

held and used exclusively for burial purposes. It sells burial rights to the public generally, to the county and city, to churches, and to other organizations. The entire income of the corporation must be used exclusively for the acquisition, operation, maintenance, and care of the cemetery, and any excess is set aside as a perpetual care fund. The decedent and her husband are buried in the cemetery. (R. 15–16, 31.)

The Commissioner disallowed as a deduction from the gross estate the agreed value of the remainder interest left to the cemetery and determined a deficiency (R. 16, 31).

Upon review, the Board of Tax Appeals sustained the action of the Commissioner (R. 32); and the Circuit Court of Appeals affirmed (R. 47).

ARGUMENT

1. The record in this case indicates, as the Circuit Court of Appeals observed (R. 43), that no free burial space is ever provided by the Oak Grove Cemetery Association and that nothing less than fair value is ever charged for burial rights or upkeep. Accordingly, on these facts, the Association cannot be regarded as a corporation organized and operated exclusively for charitable purposes within the meaning of Section 303 (a) (3). And, by the same token, the bequest to the Association, even if it be regarded as a trustee,[1] cannot be

[1] The Circuit Court of Appeals found (R. 47) that there was no necessity for deciding whether the Association held the bequest as trustee.

thought as intended to be used exclusively for charitable purposes. *Wilbur Nat. Bank, Executor* v. *Commissioner,* 17 B. T. A. 654. Accord: *Schuster* v. *Nichols,* 20 F. (2d) 179 (D. Mass.); *Craig* v. *Commissioner,* 11 B. T. A. 193, 200. The term "charitable," in Section 303 (a) (3), clearly was used in the sense of eleemosynary. *Schuster* v. *Nichols, supra,* at 181. This view is supported by the consideration that charitable organizations and cemeteries are classified separately under the Revenue Acts, and the intention to treat them similarly for certain tax purposes has always been evidenced with meticulous exactness by specific provisions, never by classifying them both as charities. See, *e. g.,* Section 103 of the Revenue Act of 1932, c. 209, 47 Stat. 169; Section 101 of the Revenue Acts of 1934 and 1936, c. 277, 48 Stat. 680, and c. 690, 49 Stat. 1648, respectively, relating to income tax exemptions. Plainly, therefore, an equally specific provision would have been made for cemetery associations had Congress had them in mind when it enacted Section 303 (a) (3).

2. None of the various cases and authorities cited by petitioner (Pet. 3–5), in an attempt to show a conflict, are concerned in any way with the question presented here.

In *Y. M. C. A.* v. *Davis,* 264 U. S. 47, this Court held merely that the Estate Tax does not exempt recipients of charitable gifts from the burden of the tax where the will places such burden upon them and that the tax, accordingly, may be charged

against the gross estate and specific bequests satisfied in full prior to satisfying residuary charitable gifts. *Helvering* v. *Bliss,* 293 U. S. 144, and *United States* v. *Pleasants,* 305 U. S. 357, were concerned only with the extent of the base for computing the 15 percent deduction from income allowable for charitable contributions. *Beatty* v. *Kurtz,* 2 Pet. 566, and *City of Cincinnati* v. *The Lessee of White,* 6 Pet. 431, raised questions concerning the formalities necessary to effectuate a dedication of land for public or pious uses. These cases, obviously, have no bearing upon the issue raised in the case at bar.

Levey v. *Smith,* 103 F. (2d) 643 (C. C. A. 7th), held that a deduction from gross income is not allowable where the testator does not require that the bequest be used exclusively for religious or charitable purposes. No question with respect to cemetery associations was presented or discussed. *Hopkins* v. *Grimshaw,* 165 U. S. 342, 352–353, held simply that a resulting trust in favor of the grantor and his heirs arose when land transferred to trustees, for the use of a particular society as a burial ground, ceased to be used for the purpose specified in the grant. G. C. M. 21610, 1939–2 Cum. Bull. 103, dealing with income-tax exemptions, declared that the purposes of an organization should be determined from the instrument creating it or from other binding instruments. The question which is pivotal to this case was not discussed. And I. T. 1256, I–1 Cum. Bull. 189, held that a gift for the use of a cemetery *owned by a city* was made

for the use of a political subdivision of a state and hence deductible under Section 214 (a) (11) of the Revenue Act of 1921. Plainly, therefore, there is no conflict.

The pivotal question in this case is whether cemetery associations which never give free burial space or charge less than fair value for burial rights and upkeep should be regarded as organized and operated exclusively for charitable purposes within the meaning of Section 303 (a) (3). The decision of the Circuit Court of Appeals is based upon an established practice expressed in the Revenue Acts to classify cemetery associations separately from charitable organizations and to provide for them specifically wherever similar treatment is intended. No conflict on this point exists.

CONCLUSION

The decision of the court below is correct and in accordance with established practice expressed in the Revenue Acts. There is no conflict. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1940.